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In the Supreme Court of the United States

OCTOBER TERM, 1957 1958

UNITED STATES OF AMERICA, PLAINTIFF

v.

STATE OF LOUISIANA

MOTION TO DISMISS ON JURISDICTIONAL GROUNDS

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UNITED STATES OF AMERICA, PLAINTIFF

v.

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MOTION TO DISMISS ON JURISDICTIONAL GROUNDS

Now comes the State of Louisiana, through its Attorney General, and with full reservation of all rights under the objections heretofore filed to the granting of leave for the filing of the bill of complaint herein, and reserving all rights to answer further to the said bill of complaint herein, now moves to dismiss the bill of complaint herein filed by the United States of America against the State of Louisiana for the following reasons and causes:

I.

This Court is without jurisdiction of the subject matter of the complaint in view of the allegation in paragraph IX therof that "the fundamental question in issue is the width of the marginal sea within the jurisdiction of the United States, which involves inquiry into and application of the foreign policy of the United States in a matter of peculiar importance and delicacy". In this connection plaintiff states on page

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16 of its brief in support of its motion for leave to file the complaint: "Thus the case requires inquiry into and application of the foreign policy of the United States, on the one hand with respect to its territorial claims against other nations, and on the other hand with respect to its assertion and recognition of freedom of the seas." The conduct of the foreign relations of the United States is committed by the Constitution to the Executive and Legislative—"the political"—Departments of the Government and is not subject to judicial inquiry or decision.

II.

The Supreme Court of the United States does not have original jurisdiction over any controversy between the United States of America and the State of Louisiana, under Article III, Section 2, of the Constitution of the United States, or under any other provision of the Constitution of the United States, because this Court is not empowered by the Constitution to entertain an original suit between the United States and a State.

III.

That the United States Constitution does not authorize or empower the United States to institute a suit against the State of Louisiana, or any State, in this Court, and, therefore, this Court cannot entertain jurisdiction of the within suit of the United States against the State of Louisiana.

IV.

That the original jurisdiction of this Court is confined to cases specified in the United States Constitution, and Congress cannot enlarge upon such jurisdiction, and, therefore, Title 28, United States Code, Section 1251(b)(2), which purports to grant to this Court original jurisdiction in controversies between the United States and a State contravenes the provisions of Article III, Section 2, of the Constitution of the United States, and the same, therefore, is unconstitutional, null and void.

V.

In the alternative, defendant, State of Louisiana, shows that in the event the said Title 28, United States Code, Section 1251 (b) (2), should be held to be constitutional against which defendant, State of Louisiana, protests, then defendant, State of Louisiana, shows that the above provision of the United States Code, which purports to grant to this Court original jurisdiction of "all controversies between the United States and a State;", does not grant to this Court jurisdiction to entertain a suit of any State against the United State, because of its sovereign immunity from suit, nor does said provision grant to this Court original jurisdiction to entertain a suit filed by the United States against the State of Louisiana, because of the State's sovereign immunity from suit, without its consent, and that the State of Louisiana, defendant, has not

consented to be sued by the United States herein. Therefore, this Court does not have jurisdiction ratione personae.

WHEREFORE, the premises considered, the State of Louisiana prays that the first ground of its motion to dismiss, contained in paragraphs I, II and III above, be sustained; that in the event the Court should overrule the grounds of defendant's motion set out in paragraphs I, II and III above, then, in the alternative, defendant prays that the alternative ground of its motion to dismiss set out in paragraphs IV and V above, be sustained, and that the complaint of the United States of America against the State of Louisiana herein be dismissed.

Oral argument is requested.

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BRIEF IN SUPPORT OF MOTION TO DISMISS ON JURISDICTIONAL GROUNDS.

I.

THIS COURT HAS NO JURISDICTION OVER THE ISSUES PRESENTED BY THE COMPLAINT.

Plaintiff avers both in the complaint and in its supporting brief that the fundamental issues presented here involve questions concerning the foreign policy of the United States and that the case requires inquiry into the nation's foreign policy with respect to its territorial claims against nations and with respect to its assertion and recognition of freedom of the seas. The complaint in paragraph IX states that this inquiry into and application of the foreign policy of the United States is the *fundamental question in issue.*

Article I Section 8 of the Constitution gives broad powers to the Congress of the United States in the matter of this nation's conduct of its foreign affairs. Thus Congress is given the authority to provide for the common defense, to regulate commerce with foreign nations, to define and punish offenses against the law of nations, to declare war and make rules concerning captures on land and water, to raise and support Armies, to provide and maintain a Navy, to exercise exclusive legislation over public properties, and to make all laws necessary and proper for carrying out these powers.

Article II, Section 2 confers upon the Executive the power to make treaties with the concurrence of two-thirds of the Senate, to appoint ambassadors and in general to direct the foreign policy of the nation.

No power is granted by the Constitution to the judiciary to inquire into these matters, and certainly there is no authority in the judiciary to determine the external boundaries of the United States. The purpose of the complaint in this case is to secure from the judiciary a determination of the external boundaries of the nation. On page 13 of plaintiff's motion for an injunction and brief in support thereof recently filed the statement is made that this case "turns mainly on a determination of the external boundary of the United States."

These are political questions and this Court has no jurisdiction to pass upon questions of a political nature. Questions relating to the foreign policy of the United States are for the Executive and the Legislative Departments, and the establishment of the nation's boundaries is a matter for the Congress to determine. This Court made the following statement in *Oetjen v. Central Leather Co., 246 US 297, 302, 62 L.Ed. 726, 732*, which is applicable to these issues:

> "The conduct of the foreign relations of our government is committed by the Constitution to the executive and legislative—"the political"—department of the government, and the propriety of what may be done in the exercise of this politi-

cal power is not subject to judicial inquiry or decision. *United States v. Palmer, 3 Wheat. 610, 4 L.Ed. 471; Foster v. Neilson, 2 Pet. 253, 307, 309, 7 L.Ed. 415, 433, 434; Garcia v. Lee, 12 Pet. 511, 517, 520, 9 L.Ed. 1176, 1178, 1179; Williams v. Suffolk Ins. Co., 13 Pet. 415, 420, 10 L.Ed. 226, 228; Re Cooper, 143 US 472, 499, 36 L.Ed. 232, 240, 12 Sup. Ct. Rep. 453.*"

In the case of *Foster & Elam v. Neilson, 2 Pet. 253, 307, 309, 7 L.Ed. 415, 433, 434,* this Court held that the determination of the nation's boundaries is a political rather than a legal question. In that case Chief Justice Marshall said *(2 Pet. 307, 309, 7 L.Ed. 433, 434):*

> "The judiciary is not that department of the government to which the assertion of its interests against foreign powers is confided; and its duty commonly is to decide upon individual rights, according to those principles which the political departments of the nation have established. * *
>
> A question like this respecting the boundaries of nations, is, as has been truly said, more a political than a legal question; and in its discussion, the courts of every county must respect the pronounced will of the Legislature."

This Court has on numerous occasions determined the boundaries between the States, and between states and territories, and in such cases has distinguished the issues there, from those involved in the *Foster* and *Elam* case, but where the inquiry involved a deter-

mination of foreign policy, the right to appropriate the open seas, and the extension or the determination of the external boundaries of the nation, the Courts have no jurisdiction.

Mr. Chief Justice Taney in *Garcia v. Lee, 12 Pet. 517, 9 L.Ed. 1179, stated:*

> "A question like this, respecting boundaries of nations, is, as has been truly said, more a political than a legal question; and in its discussion the courts of every country must respect the pronounced will of the Legislature."

Further evidence that plaintiff is seeking relief beyond the jurisdiction of this Court is found on Page 11 of its original brief in support of its motion for leave to file a complaint against Louisiana. There the plaintiff states:

> "Congress expressed no view as to the location of the boundary, intending and expecting any dispute regarding its location to be determined by this Court."

If we assume that this is true we are met with the proposition that Congress cannot delegate its legislative powers to the Court. Congress, not the Court, must fix the boundaries of the United States. There is nothing in the complaint to show that any dispute exists which is a proper subject for judicial determination.

It is therefore respectfully submitted that issues presented by the complaint in this case are issues for

the determination of Congress and not for adjudication by the Court.

II.

THIS COURT HAS NO JURISDICTION OVER A CONTROVERSY BETWEEN THE FEDERAL GOVERNMENT AND A STATE.

It is fundamental that the United States Constitution created the Supreme Court of the United States and granted to it original jurisdiction affecting only the parties specified,—i.e., ambassadors, other public ministers and consuls and those in which a State shall be a party.

In all the other cases mentioned in Section 2 of Article III pertaining to the judicial power, including controversies to which the United States shall be a party, the Constitution provided that the Supreme Court shall have appellate jurisdiction, under such regulations as the Congress shall make.

> "The original jurisdiction of the Supreme Court is confined to cases specified in the Constitution, and Congress cannot enlarge or restrict it."[1]

Constitutional Convention Record

The record of the Constitutional Convention, which wrote the Constitution of the United States is sufficiently extant for authoritative reference as to what judicial power was granted to the United States

[1] Marbury v. Madison, D.C. 1803, 1 Cranch 137, 2 L.Ed. 60.

and what original jurisdiction was conferred upon the Supreme Court of the United States, as well as to what judicial power and jurisdiction were denied to the United States and to this Court.

First: On June 17, 1787, the Convention had before it the Paterson Plan.[2]

Included in the plan was a recommendation which read as follows:

> "Provision ought to be made for hearing and deciding upon all disputes arising between the United States and an individual state, respecting territory."

On June 19, 1787, *the Convention adopted a motion* by a vote of 7 to 3, 1 state divided, *to reject the Paterson Plan.* This rejection included the above proposition.[3]

Second: Mr. Pinckney submitted several propositions to the Convention on August 20, 1787, and they were referred to the Committee of Detail. One of the propositions read as follows:

> "The jurisdiction of the Supreme Court shall be extended to all controversies between the United States and an individual state; or the United States and the citizens of an individual state."[4]

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[2] H. Doc. 398, 69th Cong.; 1st Sess. pp. 769 & 973; 1 Eliott's Debates, p. 177.

[3] 1 Elliott's Debates 180.

[4] The Madison Papers, Vol. III, p. 1366; H. Doc. 398, 69th Cong.; 1st Sess.; p. 572.

No action was taken on the above proposition.

Third: On August 22, 1787, Mr. Rutledge for the Committee of Detail, submitted a report to the Convention, suggesting the following amendment to the Randolph or Virginia Plan, then before the Convention:

> "Between the fourth and fifth lines of the third section of the eleventh article, after the word 'controversies', insert 'between the United States and an individual state, or the United States and an individual person' "[5]

The record shows that *no action was taken on this proposition.*

Fourth: Mr. Carroll made the following motion to the Convention on August 30, 1787:

> "Nothing in this Constitution shall be construed to alter the claims of the United States, or of the individual states, to the western territory; but all such claims shall be examined into, and decided upon, by the Supreme Court of the United States."[6]

While the proposed extension of jurisdiction would have only applied to the United States and individual states regarding western territory, it involved the same basic proposition of granting to the United States

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[5] The Madison Papers, Vol. III, p. 1399; H. Doc. 398, 69th Cong.; 1st Sess.; p. 595-6.

[6] The Madison Papers, Vol. III, p. 1465; H. Doc. 398, 69th Cong.; 1st Sess.; p. 644.

Supreme Court original jurisdiction of controversies between the United States and States of the Union.

The Carroll motion was postponed, and the record shows that *the Convention never took action on it.*

Turning from definitive rejection by inaction to peremptory rejection by action, we come to the proceedings of the Convention on August 30, 1787.

Fifth: On August 30, 1787, the Convention was considering Article XVII of the Randolph Plan,[7] regarding the admission of new states, and a discussion arose in regard to claims of the United States and individual states to territory.[8]

The following proposition was submitted as an addition to the draft of the Constitution:

> "The Legislature shall have power to dispose of, and make all needful rules and regulations respecting, the territory or other property belonging to the United States; and nothing in this Constitution shall be construed as to prejudice any claims, either of the United States or of any particular state."

Thereupon, a motion was made to amend said proposal so as to add the following sentence:

> "But all such claims may be examined into, and decided upon, by the Supreme Court of the United States."

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[7] H. Doc. 480.

[8] The Madison Papers; Vol. III, pp. 1465-1466; H. Doc. 398, 69th Cong.; 1st Sess.; pp. 644-645.

This motion to amend was peremptorily rejected by a vote of 8 states against and only 2 states for the motion.[9]

Thus, there were before the Federal Constitutional Convention propositions to grant Original jurisdiction to the United States to controversies between the United States and an individual state and to examine into and decide upon the claims of the United States and an individual state to territory or property, none of which was incorporated into the Constitution and *the last of which was peremptorily rejected.*

Nowhere in the action of the Constitutional Convention, nor in any provision adopted as a part of the United States Constitution can it be shown that the original jurisdiction of this Court was made to extend either to controversies between the United States and any particular state or to the claim of any territory or property between the United States and any particular state.

By the action of the Constitutional Convention on August 30, 1787 in peremptorily rejecting the proposition that the Supreme Court of the United States should be given original jurisdiction to examine into and decide territorial claims of the United States and individual states, this Court was denied the very jurisdiction which the bill of complaint here seeks to have it exercise, because this Court does not have jurisdiction over the subject matter of this suit.

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[9] H. Doc. 398, p. 645, 1 Elliott's Debates 275, 276.

In view of the incontrovertible fact that the original jurisdiction of this Court stems from the Constitution of the United States, and from no other source or authority, it cannot be successfully argued or urged upon this Court, that the original jurisdiction of this Court extends to the present case which involves a controversy between the United States and the State of Louisiana, over a claim to territory or other property.

The early decisions of this Court, when the proceedings and history of the Constitutional Convention were fresh in the mind of the jurists, some of whom had either served as delegates or advocated ratification, bear out the fact that the Constitution does not give this Court original jurisdiction of a suit by the United States against a state, and, further, that the original jurisdiction conferred upon this Court by the Constitution cannot be extended.

Marbury v. Madison[10] held an Act of Congress unconstitutional, for the first time, because it sought to extend the original jurisdiction of this Court to suits against officials (Secretary of State) of the United States.

In *Cohens v. Virginia*[11] it was held that the original jurisdiction of this Court depended on the character of parties designated in the Constitution—and that

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[10] See footnote 1, supra.

[11] (1821) 6 Wheat. (19 US) 262, 5 L.Ed. 264.

after passage of the 11th Amendment, the original jurisdiction of this Court still extended to cases between two or more states, or between a State and a foreign state. (Not the United States).

In *Cherokee Nation v. Georgia*,[12] this Court held that the original jurisdiction of this Court extends only to cases in which both the plaintiff and the defendant are designated in the class of parties specified in the Constitution.

In this case, this Court held (p. 15):

> "Before we can look into the merits of the case, a preliminary inquiry presents itself. *Has this Court jurisdiction of the cause?*"

The Court referred to the third Article of the Constitution which describes the extent of the judicial power, Section 2 of which reads:

> "2. The judicial Power shall extend to all cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;—to all Cases affecting Ambassadors, other public Ministers and Consuls;—to all Cases of Admiralty and maritime Jurisdiction;—to Controversies to which the United States shall be a party;—to Controversies between two or more States;—between a State and citizens of another State;—between Citizens of different States;—between Citizens of the same State claiming Lands under Grants of different States, and between a

[12] (1831) 5 Pet. (30 US) 1, 8 L.Ed. 1.

> State, or the Citizens thereof, and foreign States, Citizens or Subjects."

and said (p. 15):

> "A subsequent clause of the same section gives the Supreme Court original jurisdiction in all cases in which a State shall be a party. The party defendant may then unquestionably be sued in this Court. *May the plaintiff sue in it?* Is the Cherokee Nation a foreign State in the sense in which the term is used in the Constitution?"

There it was held by the Court that the Cherokee Indian tribe within the United States is not a foreign State in the sense of the Constitution, and cannot maintain an action in the Courts of the United States.

By the same reasoning and authority, therefore, the United States is not a state, or a foreign State which may sue in the Supreme Court, in the sense in which the terms are used in the Constitution.

In *Rhode Island v. Massachusetts*,[13] this Court held that the sovereign States in Convention assembled made a grant to the United States of *judicial power* over controversies between two or more States, and it was ordained that the Supreme Court should have original jurisdiction in cases where a State was party "*in the cases specified*".

In *Florida v. Georgia*,[14] the Court held that while the United States could not intervene as party plaintiff

[13] (1838) 12 Pet. (37 US) 657, p. 720, 9 L.Ed. 1233.
[14] (1854) 17 Howard (58 US) 478, 15 L.Ed. 181.

or defendant in a suit between two States, its Attorney General would be permitted to file evidence for the information of the Court (as a sort of amicus curiae), and the Attorney General for the United States formally, in his brief, admitted that this Court is not empowered by the Constitution to entertain an original suit between the United States and a State, and that it is a settled rule of law that where the jurisdiction depends on the character of the parties, each party must be competent to sue or be sued in this Court.

In this case the United States of America, through its Attorney General, formally admitted that this Court did not have original jurisdiction of a suit in which the United States was plaintiff against a State of the Union, as follows:[15]

> "The United States cannot be made a party in any form to an original suit in this Court between two states."
> (Citing Clause 2 of Section 2 of Article III of the Constitution).
>
> "The court has jurisdiction in this case only in virtue of the clause of the Constitution which authorizes it to adjudicate on 'controversies between two or more states".
>
> To be sure, afterward, it is said, that 'in all cases . . in which a state shall be party the Supreme Court shall have original jurisdiction.' But this is not the delegation of a new class of jurisdiction as to subject matter. The clauses are to

[15] 15 L.Ed. p. 184.

be taken together so as to signify that the original jurisdiction shall embrace either of the foregoing enumerated cases in which the jurisdiction attaches to a state.

The court is not empowered by the Constitution to entertain an original suit between the United States and a state, or the United States and two states.

It is the settled rule of law that where the jurisdiction of the Courts of the United States depends on the character of the parties, and each party, either plaintiff or defendant, consists of a number of individuals *each one must be competent to sue or be sued in those courts; and otherwise jurisdiction cannot be entertained.*" (Emphasis added)

The Supreme Court of the United States is not empowered by any theory of inherent power to delegate to itself jurisdiction which the Constitution does not grant to it, and which the Convention that wrote the United States Constitution specifically refused to grant.

The constitutional question submitted to this Court by special appearance presents a barrier to further proceedings in this case because of the lack of constitutional authority or jurisdiction in this Court.

Regardless of the fact that this Court may have rendered judgments in other cases of the United States against particular states, such does not constitute *stare*

decisis or precedent prejudicial to the State of Louisiana herein.

We are not unmindful in making this argument of the case of *United States v. West Virginia*,[16] and the other cases therein cited; however, it has been the declared policy of this Court to interpret the language of the constitution *itself* free from the gloss that may have been placed upon it by earlier decisions, particularly where the precise issue was never raised by the defendants in the other cases.

In such cases the fact that other states, either by design or oversight consented to be sued, or failed to raise the constitutional objection to lack of jurisdiction in this Court to entertain such action by the United States against a particular state, cannot be considered as authority over-riding the action of the Constitutional Convention in refusing to grant this Court original jurisdiction in such controversies.

The Constitution as originally written and the action of the Constitutional Convention in refusing to give this Court jurisdiction in such cases, has not been changed or over-ridden by any amendment to the United States Constitution adopted in any manner prescribed for amendment to the Constitution.

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[16] 295 US 463, 55 S.Ct. 789, 79 L.Ed. 1546.

III

CONGRESS CANNOT ENLARGE COURT'S ORIGINAL JURISDICTION

As held by this court frequently, the original jurisdiction of the Supreme Court is confined to cases specified in the Constitution, and Congress cannot enlarge or restrict it.

If the original jurisdiction of this Court is to be measured by the express and exclusive grant in the United States Constitution, Article III, Section 2, and if the rule of interpretation that an Act of Congress cannot supersede the relevant provisions of the Constitution, then it must follow that the provisions in Title 28, United States Code, Section 1251 (b)(2), purporting to grant to this Court original jurisdiction of controversies between the United States and a State is unconstitutional as contravening the positive provision of Article III, Section 2, of the Constitution of the United States, as above.

The Court's attention is particularly directed to the history of the adoption of Article III, Section 2, of the Constitution, as shown by the record of the Convention above referred to, when original jurisdiction in controversies between the United States and any particular State was denied by action of the Constitutional Convention.

While this Court has entertained jurisdiction and rendered judgments in several suits of the United

States against individual states, a close study of such cases will disclose that little or no consideration was given to the fundamental principal involved, as held in *Marbury v. Madison*[17] and later cases, and also as admitted by the United States through its Attorney General in *Florida v. Georgia*, (1854)[18] that this Court was not empowered by the Constitution to entertain an original suit between the United States and a State; that the original jurisdiction of this Court depended upon the character of the parties, and each party, plaintiff and defendant, must be competent to sue or be sued in the original jurisdiction of this Court,—otherwise jurisdiction cannot be entertained.

Furthermore, the position taken by this Court in exercising original jurisdiction in suits by the United States against individual States since 1890[19] was virtually with the acquiescence of the States sued, without issue being made of the lack of jurisdiction on the part of this Court.

As stated by the Court in the North Carolina case, the first in which this Court assumed such original jurisdiction, "It is true that no question was made as to the jurisdiction of this Court, and nothing was, therefore, said in the opinion upon that subject."

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[17] 1 Cranch 137, 2 L.Ed. 60.

[18] 12 Pet. (37 US) 657, 9 L.Ed. 1233.

[19] US v. North Carolina, 136 US 211, 10 S.Ct. 920, 34 L.Ed. 336; US v. Texas, 143 US 621, 12 S.Ct. 488, 492, 36 L.Ed. 285.

From then on this Court exercised jurisdiction of several other suits of the United States against individual States, because it had exercised jurisdiction in the suit of the *United States v. North Carolina*,[20] when no question was made as to the jurisdiction of this Court.

It can be said, however, that this Court has never assumed to overrule *Marbury v. Madison*,[21] and later cases, which affirmed its constitutional holding that this Court does not have jurisdiction of a suit in the United States against an individual State.

In 1909 this Court held:

> "In a note to United States v. Ferreira, 13 How, on page 52, 14 L.Ed. on page 47, note, which was inserted by order of the court, the chief justice states the substance of the case of the United States v. Todd, which was decided in February, 1794, but not printed, as there was at that time no official reporter. This note thus concludes:
>
> 'In the early days of the government, the right of Congress to give original jurisdiction to the Supreme Court in cases not enumerated in the Constitution was maintained by many jurists, and seems to have been entertained by the learned judges who decided Todd's case. But discussion and more mature examination has settled the question otherwise; and it has long been the established

[20] See footnote 19, supra.
[21] See footnote 17, supra.

doctrine, and we believe now assented to by all who have examined the subject, that the original jurisdiction of this court is confined to the cases specified in the Constitution, and that Congress cannot enlarge it. In all other cases its power must be appellate.'

Such is the settled rule, and it is inadmissible to suppose that it was the intention of Congress to run counter to it.' "[22]

In 1910, this Court reiterated the same holding.[23]

In 1926, this Court again held:

"The words of a second great constitutional authority quoted as in conflict with the congressional decision are those of Chief Justice Marshall. They were used by him in his opinion in *Marbury v. Madison* (1803) 1 Cranch, 137, 2 L.Ed. 60. The judgment in that case is one of the great landmarks in the history of the construction of the Constitution of the United States, and is of supreme authority first in respect to the power and duty of the Supreme Court and other courts to consider and pass upon the validity of acts of Congress enacted in violation of the limitations of the Constitution when properly brought before them in cases in which the rights of the litigating parties require such consideration and decision, and second in respect to the lack of power of Congress to vest in the Supreme Court original juris-

[22] B. & O. R.R. Co. v. Interstate Commerce Comm., 215 US 216, 30 S.Ct. 86, 88, 89, 54 L.Ed. 164.

[23] Muskrat v. United States, 219 US 346, 31 S.Ct. 250, 252, 55 L.Ed. 246.

diction to grant the remedy of mandamus in cases which by the Constitution it is given only appellate jurisdiction."[24]

Such a solemn constitutional pronouncement exposes the utter lack of the competency of the United States to sue an individual State, and the lack of original jurisdiction in this Court to entertain such a suit, in spite of the fact that this Court has entertained such jurisdiction in cases where serious and proper consideration was not given to the constitutional principle, which denies this Court such original jurisdiction, and which also denies to Congress the right to grant this Court such jurisdiction.

Therefore, we submit the Act of Congress which attempted to grant this Court original jurisdiction in controversies between the United States and a State is unconstitutional, and this Court should so hold.

IV

NEITHER THE UNITED STATES NOR THE STATE OF LOUISIANA MAY BE SUED WITHOUT ITS CONSENT.

In the event this Court should hold that it has original jurisdiction of a controversy between the United States and a State, to hold that it has jurisdiction in this suit of the United States against the State of Louisiana, it would have to do violence to the

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[24] Myers v. United States, 272 US 52, 47 S.Ct. 21, 23, 71 L.Ed. 160.

fundamental principle that a sovereign State may not be sued without its consent.

This Court has held that the United States as a sovereign could not be sued by a State in the original jurisdiction of this Court, without its consent.[25]

This Court has held that a State, as a sovereign, could not be sued in the original jurisdiction of this Court by a foreign nation, without its consent.[26]

This Court held that since a State could not be sued outside of this Court, without its consent, it could not be sued in this Court, without its consent; and that the second clause of Section 2 of Article III of the Constitution, which conferred jurisdiction upon this Court, "In all cases . . . in which a State shall be a party" withheld the consent of a State to be sued by anybody.

The Court held that this clause of the Constitution merely distributed into original and appellate jurisdiction the jurisdiction previously conferred, and did not of itself confer additional jurisdiction.

In this connection, the Court's attention is directed to the fact that Article III, Section 2 of the Constitution specifically extends the judicial power to cases between a State and foreign States. Still this Court held that the foreign State of Monaco could not sue the State of

[25] Kansas v. United States, 204 US 331, 27 S.Ct. 388, 51 L.Ed. 510.

[26] Monaco v. Mississippi, 292 US 313, 54 S.Ct. 745, 78 L.Ed. 1282.

Mississippi without its consent. Therefore, plainly the grant of jurisdiction does not destroy the States' sovereign power of immunity from suit.

Neither can the provision of an Act of Congress, Title 28, United States Code, Section 1251 (b)(2), purporting to grant this Court original jurisdiction of controversies between the United States and a State, deprive a State of its sovereign power of immunity from a suit without its consent.

Regardless of the fact that this Court may have entertained jurisdiction of suits by the United States against States in other cases, defendant, the State of Louisiana, urges with all possible emphasis that there is not such constitutional grant of authority to this Court to entertain a suit of the United States against a State, nor is there any provision of the Constitution which can be interpreted to deprive a State of its sovereign immunity of suit without its consent.

Nor can any provision of the Constitution be found which grants to Congress the authority by legislation to deprive a State of its sovereign immunity of suit without its consent.

This Court in *Hans v. Louisiana, 134 US 1, 16, 10 S. Ct. 504, 33 L.Ed. 842*, held that, "The suability of a state without its consent was a thing unknown to the law."

No more recent reiteration of this principle could be found than the action of this court on June 4th, 1956,

wherein by denying writ of certiorari this court affimed the United States Court of Appeals for the Fifth Circuit in the case of *Louisiana Land and Exploration Company vs. Louisiana State Mineral Board*, No. 15531, that court holding:

> "It is therefore plain that the State Mineral Board cannot be enjoined in this suit since the compulsion which the court is asked to impose would be compulsion against the sovereign; and for that reason the suit is barred by the Eleventh Amendment, not because it is a suit against the Board, but because it is, in effect, a suit against the State."

Therefore, by any rule of judicial interpretation, it must be held that the provision in Title 28, United State Code, Section 1251 (b)(2), does not grant to this Court jurisdiction of a suit by the United States against the State of Louisiana without the consent of this State to be sued.

WHEREFORE, the State of Louisiana prays that this motion to dismiss on jurisdictional grounds be sustained, and the complaint of the United States herein against the State of Louisiana dismissed; that, in the event the court should overrule said motion, the State of Louisiana, pursuant to its reservation of rights, be granted leave to answer further to the

merits of the bill of complaint and that it be granted a period of thirty (30) days within which to take said action.

All of which is respectfully submitted,

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PROOF OF SERVICE

I, ..., one of the Attorneys for the State of Louisiana, defendant herein, and a member of the Bar of the Supreme Court of the United States, certify that on the ..... day of ....., 1956, I served copies of the foregoing Motion to Dismiss on Jurisdictional Grounds, With Supporting Brief, by leaving copies thereof at the offices of the Attorney General and of the Solicitor General of the United States, respectively, in the Department of Justice Building, Washington, D. C.